

# Legislating Religious Freedom and Discrimination in Schools: A Theoretical Critique

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## I. INTRODUCTION

Societal shifts that call for greater inclusion and the removal of discriminatory barriers in all areas of life have extended to religious schools and discrimination. Generally, discriminating against a person because of their sex, sexual orientation, gender identity, marital or relationship status, or pregnancy, among other protected characteristics, is prohibited in a broad range of contexts.<sup>1</sup> However, religious schools may discriminate against staff and students in all the listed traits to avoid injury to the susceptibilities of religious adherents.<sup>2</sup> The resulting concern is that persons with such traits may be denied the opportunity to work or study at a religious institution. Those discriminated against often offend the relevant religion's doctrine, illustrating the fundamental tension between religious freedoms and progressivist ideals. A vast array of arguments has been presented by many stakeholders, each with varying underlying values.<sup>3</sup> Positions taken can be broadly categorised into three policy outcomes regarding the *Sex Discrimination Act* (Cth) s 38 ('SDA')<sup>4</sup>: repealing it, amending it, or leaving it unchanged.<sup>5</sup>

Applying Thomas Aquinas' theory of classical natural law, it is submitted that the relevant section should be repealed and that certain necessary amendments should be made.<sup>6</sup> This is achievable by deriving a specific conclusion from first principles that religious schools should not discriminate. Such a conclusion is made possible by relying on the concept that all are made in God's image, that compassion is unconditional, and that Jesus' ministry displayed radical inclusivity. This outcome will ease enduring tensions and ensure all Australians can work and study at religious institutions.

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<sup>1</sup> *Sex Discrimination Act 1984* (Cth) ss 14(1)–(2) ('SDA').

<sup>2</sup> *Ibid* ss 38(1), (3); Australian Human Rights Commission, Submission No 384 to Australian Law Reform Commission, *Inquiry into Religious Educational Institutions and Anti-Discrimination Laws* (2 March 2023) 4 [4]; Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (Report No 142, December 2023) 26 [1.6] ('*Religious Schools and Discrimination: Final Report*').

<sup>3</sup> Australian Law Reform Commission, *Religious Educational Institutions and Anti-Discrimination Laws: What We Heard* (Background Paper ALD2, November 2023) 36 [132] ('*Religious Schools and Discrimination: Submissions*'); *Religious Schools and Discrimination: Final Report* (n 2) 26 [1.6].

<sup>4</sup> *SDA* (n 1).

<sup>5</sup> Queensland Human Rights Commission, Submission No 125 to Australian Law Reform Commission, *Inquiry into Religious Educational Institutions and Anti-Discrimination Laws* (23 February 2023) 2 [3]; *Religious Schools and Discrimination: Submissions* (n 3) 3 [15].

<sup>6</sup> *SDA* (n 1) ss 23(3)(b), 37(1)(d), 38; *Religious Schools and Discrimination: Final Report* (n 2) 86 [4.4].

## II. AQUINAS' CLASSICAL NATURAL LAW

Drawing on Greek, Roman, and earlier medieval ideas, Aquinas outlined his theory of law in *Summa Theologica*,<sup>7</sup> published unfinished after he died in 1274.<sup>8</sup> Aquinas identified four types of law that fit within a hierarchical structure.<sup>9</sup> The eternal law is first and supreme, relating to God's rational plan and guidance for all created things in the Universe.<sup>10</sup> The divine law is lesser, referring to principles revealed through Scripture, and is particularly significant for guiding mankind toward salvation.<sup>11</sup> Lower still is the natural law, which governs human action in the temporal realm through reason and results in self-evident first principles.<sup>12</sup>

These general precepts derive from the basic impulse that good is to be done, and evil avoided.<sup>13</sup> Such principles are infinite in number, so Aquinas presents an inclusive list of five: preserve life, pursue knowledge, be sociable, procreate, and exercise practical reasonableness.<sup>14</sup> To narrow the submission's scope and avoid excess subjectivity, only the sociability precept is applied to the policy outcomes, as it is most relevant to discrimination.<sup>15</sup> In this sense, Aquinas' theory proves useful in facilitating a unique theoretical critique, wherein biblical principles provide a robust basis for evaluating the three discussed positions.<sup>16</sup>

Derivations can be made from the principle of sociability either as a conclusion or a determination of certain generalities, both of which are found in the weakest level of law: human law.<sup>17</sup> However, only conclusions are sanctioned by human and natural law, while determinations obtain validity solely from human law.<sup>18</sup> It is also acknowledged that human reason is inherently flawed, and specific conclusions deriving from first principles differ according to unequal reasoning, changing circumstances, the effects of passion, a lack of culture, bad habits, and an inability to argue rationally.<sup>19</sup> The divine law must be considered to remedy these deficiencies.<sup>20</sup>

<sup>7</sup> Thomas Aquinas, *Summa Theologica*, tr Fathers of the English Dominican Province (Benziger Bros, 1947).

<sup>8</sup> Columba Ryan, *Light on the Natural Law*, ed Illtud Evans (Burns and Oates, 1965) 13–16; Michael DA Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, 9<sup>th</sup> ed, 2014) 126.

<sup>9</sup> Aquinas (n 7) q 91; Anton-Hermann Chroust and Frederick A Collins Jr, 'The Basic Ideas in the Philosophy of Law of St Thomas Aquinas as Found in the "Summa Theologica"' (1941) 26(1) *Marquette Law Review* 11, 13.

<sup>10</sup> Aquinas (n 7) q 91 art 1; Freeman (n 8) 127; John Finnis, *Aquinas' Moral, Political, and Legal Philosophy* ed Edward N Zalta (Stanford Encyclopedia of Philosophy, March 2021) <<https://plato.stanford.edu/entries/aquinas-moral-political/>>.

<sup>11</sup> Aquinas (n 7) q 91 arts 4–5; Raymond Bradley, 'The Relation Between Natural Law and Human Law in Thomas Aquinas' (1975) 21(1) *The Catholic Lawyer* 42, 49.

<sup>12</sup> Aquinas (n 7) q 91 art 2; Robert A Panev, 'Hans Kelsen and the Role of Religion in Natural Law Doctrine' (2012) 3 *Western Australian Jurist* 259, 263; Stephen L Brock, 'The Legal Character of Natural Law According to St Thomas Aquinas' (DPhil Thesis, University of Toronto, 1988) 1.

<sup>13</sup> Ryan (n 8) 26; RD Lumb, 'The Scholastic Doctrine of Natural Law' (1959) 3 *Melbourne University Law Review* 205, 207.

<sup>14</sup> Aquinas (n 7) q 94, arts 2–3; Mark Murphy, *The Natural Law Tradition in Ethics*, ed Edward N Zalta (Stanford Encyclopedia of Philosophy, June 2019) <<https://plato.stanford.edu/entries/natural-law-ethics/>>.

<sup>15</sup> Aquinas (n 7) q 94 arts 2–3; Finnis (n 10); Freeman (n 8) 129; Murphy (n 14); Ryan (n 8) 35.

<sup>16</sup> See above 5 and accompanying text; Aquinas (n 7) q 94 arts 2-3; Finnis (n 10); Freeman (n 8) 128; Murphy (n 14); Ryan (n 8) 35.

<sup>17</sup> Aquinas (n 7) q 95 art 2; Bradley (n 11) 43–4; Freeman (n 8) 130.

<sup>18</sup> Aquinas (n 7) q 95 art 2; Freeman (n 8) 130.

<sup>19</sup> Ryan (n 8) 31–7; Jonathan Crowe, 'Is Natural Law Timeless?' (2021) 33(1) *Bond Law Review* 1, 7.

<sup>20</sup> Aquinas (n 7) q 94 art 5; Ryan (n 8) 35–6.

Therefore, Aquinas defines law as a rational ordering of things concerning the common good, effected by whoever is responsible for governing.<sup>21</sup> A just human law conforms to natural law and, for present purposes, sociability specifically; if it does not, it is no law at all.<sup>22</sup>

### III. SCOPE AND LIMITATIONS

The prominence of education in Australian society and the tension between religious freedom and anti-discrimination mean that every Australian is likely to be impacted by reform to laws permitting religious schools to discriminate.<sup>23</sup> However, the critical stakeholders are identifiable from the relevant section's framing as current and prospective staff and students who are sexual minorities, gender diverse, or unmarried pregnant women and religious school communities.<sup>24</sup> These encompass staff, students, and their families.<sup>25</sup>

Further, this submission focuses on religious schools discriminating against sexual minorities, unwed pregnant women, and gender diverse persons, despite the alternative grounds of sex and marital or relationship status.<sup>26</sup> While there is scope to construct a compelling argument on all grounds endorsing any outcome, the utilisation of classical natural law favours consideration of the focus grounds.<sup>27</sup> This is because the theory's Catholic roots support a presumption that sexual minorities, gender diverse persons, and unwed pregnant women resulting from premarital sex are sinful.<sup>28</sup>

This submission is limited by involving substantial biblical interpretation, an inherently subjective task.<sup>29</sup> The referenced background of classical natural law and the progressive

<sup>21</sup> Aquinas (n 7) q 90 art 4; Freeman (n 8) 127.

<sup>22</sup> Aquinas (n 7) q 95 art 2; Freeman (n 8) 130; Simona Vieru, 'Aristotle's Influence on the Natural Law Theory of St Thomas Aquinas' (2010) 1 *Western Australian Jurist* 115, 120.

<sup>23</sup> *Australian Constitution* s 116; *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(4); Alex Deagon, Submission No 4 to Australian Law Reform Commission, *Inquiry into Religious Educational Institutions and Anti-Discrimination Laws* (22 February 2023) 5.

<sup>24</sup> *SDA* (n 1) s 38; Deagon (n 23) 5; Australian Lawyers Association, Submission No 162 to Australian Law Reform Commission, *Inquiry into Religious Educational Institutions and Anti-Discrimination Laws* (23 February 2023) 5 [5], 7 [11].

<sup>25</sup> Independent Schools Queensland, Submission No 119 to Australian Law Reform Commission, *Inquiry into Religious Educational Institutions and Anti-Discrimination Laws* (23 February 2023) 2; The Association of Independent Schools of New South Wales, Submission No 154 to Australian Law Reform Commission, *Inquiry into Religious Educational Institutions and Anti-Discrimination Laws* (22 February 2023) 1.

<sup>26</sup> *SDA* (n 1) s 38; Brent L Pickett, 'Natural Law and the Regulation of Sexuality: A Critique' [2004] *Richmond Journal of Law and the Public Interest* 39, 39.

<sup>27</sup> Mark Strasser, 'Natural Law and Same-Sex Marriage' (1998) 48(1) *DePaul Law Review* 51, 81; Rusi Jagose, 'Catholic Canon Law and Homosexuality: An Assessment of the Natural Law Justification for Homosexual Intolerance' (2022) 54 *Victoria University of Wellington Law Review* 709, 714.

<sup>28</sup> Christopher Lamb, 'Pope's Approval of Same-Sex Blessings Marks Historic Shift for Gay Catholics', *Cable News Network* (online, 19 December 2023) <<https://edition.cnn.com/2023/12/19/europe/popes-approval-of-same-sex-blessings-intl/index.html>>; Eline Huygens, "'My Dream is That I Share the Bed with Only One Man': Perceptions and Practices of Premarital Sex Among Catholic Women in Belgium' (2021) 69(1) *Social Compass* 69, 70.

<sup>29</sup> John H Walton, 'Inspired Subjectivity and Hermeneutical Objectivity' (2002) 13(1) *Master's Seminary Journal* 65, 66; William W Klein, Craig L Bloomberg, and Robert L Hubbard Jr, *Introduction to Biblical Interpretation*, ed Kermit A Ecklebarger (Word Publishing, 1993) 8.

approach of the modern Church favour more liberal constructions.<sup>30</sup> The Church has historically been a traditional and conservative institution.<sup>31</sup> Depending on the interpreter, the provided meanings of explored verses may be sympathised with or opposed.<sup>32</sup>

#### IV. SOCIABILITY

From the general precept to be sociable, it is arguable that a specific conclusion to generally not discriminate is derivable.<sup>33</sup> Whether this extends to religious schools and those deemed sinners by the Catholic ethos is less clear.<sup>34</sup> If the basic impulse is turned to, excluding sinners may be perceived as good or evil.<sup>35</sup> Considering the divine law for guidance is necessary.<sup>36</sup>

##### A. IN THE IMAGE OF GOD

A cornerstone of the Christian ethos is stated in Genesis 1:27: ‘So God created mankind in his own image, in the image of God he created them; male and female he created them’.<sup>37</sup> This has been interpreted to establish the equal dignity of every person, with contextual readings suggesting that the intent is to be liberating and empowering, rather than oppressive.<sup>38</sup> Saint Paul, in indicating ‘there is neither Jew nor Gentile, neither slave nor free, nor is there male and female, for you are all one in Jesus Christ’, is often inconclusively cited in support.<sup>39</sup> Aquinas himself also supports such a construction, drawing on the earlier work of Saint Augustine of Hippo.<sup>40</sup> The Holy See has applied Genesis 1:27 to support religious freedom, lending substantial support to the idea that it supports the rights of persons who oppose the teachings of Christ.<sup>41</sup> The Vatican has even utilised the verse to endorse the environmental movement, describing how it justifies social movements which seek to uphold human rights

<sup>30</sup> See above n 28; Jay J Carney, ‘Global Catholicism: Diverse, Troubled, Holding Steady’ (2021) 46(1) *International Bulletin of Mission Research* 25, 26; Pedro Paulo Weizenmann, ‘Pope Francis’ Puzzling Political Views: Defying the Conservative-Progressive Binary’ (2018) 39(2) *Harvard International Review* 8, 8.

<sup>31</sup> Francis G. Wilson, ‘Liberals, Conservatives, and Catholics’ (1962) 344(1) *ANNALS of the American Academy of Political and Social Science* 85, 86; Walton (n 29) 66.

<sup>32</sup> Klein, Bloomberg, and Hubbard (n 29) 8; Walton (n 29) 66.

<sup>33</sup> Aquinas (n 7) q 94, arts 2-3; Finnis (n 10); Murphy (n 14); Ryan (n 8) 35.

<sup>34</sup> Aquinas (n 7) q 94, arts 2-3; Finnis (n 10); Murphy (n 14); Ryan (n 8) 35; Michael Allen, ‘First Principles and Last Things for a Theology of Work’ (2024) 9(1) *Reformed Faith and Practice* 46, 47.

<sup>35</sup> Ryan (n 8) 35; Susan Dimock, ‘The Natural Law Theory of St Thomas Aquinas’ in Joel Feinberg and Jules Coleman (eds), *The Philosophy of Law* (Wadsworth, 6<sup>th</sup> ed, 2000) 10.

<sup>36</sup> Aquinas (n 7) q 94 art 5; Ryan (n 8) 35–6.

<sup>37</sup> *Biblica*, Genesis 1:27 (New International Version, 2<sup>nd</sup> rev ed, 2011).

<sup>38</sup> J Richard Middleton, ‘The Liberating Image? Interpreting the Imago Dei in Context’ (1994) 24(1) *Christian Scholars Review* 8, 16; Wojciech Szerba, ‘The Concept of Imago Dei as a Symbol of Religious Inclusion and Human Dignity’ (2020) 25(1) *Forum Philosophicum* 13, 17.

<sup>39</sup> *Biblica* (n 37) Galatians 3:28. See Jakobus M. Vorster, ‘The Theological-Ethical Implications of Galatians 3:28 for a Christian Perspective on Equality as a Foundational Value in the Human Rights Discourse’ (2019) 53(1) *In Die Skriflig* 2494:1–9, 6; Rhoda Ayomiotan Bamisile, ‘Interpreting Galatians 3:28 in the Light of Feminist Theology’ (2020) 21(44) *American Journal of Biblical Theology* 4(1): 1–15, 12.

<sup>40</sup> Matthew Puffer, ‘Human Dignity After Augustine’s Imago Dei: On the Sources and Uses of Two Ethical Terms’ (2017) 37(1) *Journal of the Society of Christian Ethics* 65, 78.

<sup>41</sup> The Holy See, ‘Declaration on Religious Freedom’, *Vatican Archive* (Web Page, 7 December 1965) [1], [15] <[https://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651207\\_dignitatis-humanae\\_en.html](https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html)>.

and ensure equal access to resources.<sup>42</sup> The movement seeking equality for sexual minorities and gender-diverse persons arguably falls within both of these categories.<sup>43</sup>

However, this interpretation is far from universal.<sup>44</sup> It has been claimed that Genesis 1:27 has no relation to human dignity, although a more moderate position, that it supports equality only among Christian adherents, is generally favoured.<sup>45</sup> However, Aquinas emphasised that the authoritative interpreter of the Bible is the Catholic Church.<sup>46</sup> Pope Francis, although maintaining moral reservations about homosexual conduct, stated in 2018 that God made a man gay and loved him, while elsewhere he rejected a rightly ordered love approach to justify deportations.<sup>47</sup> The understanding that this verse affirms dignity for all is accordingly preferred.

Applying this interpretation to laws permitting religious schools to discriminate, change is warranted. If Genesis 1:27 grants every person equal dignity irrespective of their personal characteristics or religious affiliation, by extension, it does not support religious schools discriminating against sexual minorities, gender diverse persons, and unwed pregnant women.<sup>48</sup> Approximately 90% of Australian private schools have some religious affiliation.<sup>49</sup> Denying the enrolment of students with such traits denies them the freedom of choice and may restrict their access to specific or superior opportunities associated with generally better-funded private schools.<sup>50</sup> Religious schools are also desirable for many over public alternatives, because of the moral ideals they promote regardless of the particular student's beliefs.<sup>51</sup>

Denying employment or career progression due to a specific characteristic could affect staff income, job prospects, and the ability to work in desired roles or near friends and family.<sup>52</sup>

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<sup>42</sup> The Holy See, 'Communion and Stewardship: Human Persons Created in the Image of God', *Vatican Archives* (Web Page, 2004) [73] <[https://www.vatican.va/roman\\_curia/congregations/cfaith/cti\\_documents/rc\\_con\\_cfaith\\_doc\\_20040723\\_communion-stewardship\\_en.html](https://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_con_cfaith_doc_20040723_communion-stewardship_en.html)>.

<sup>43</sup> *Religious Schools and Discrimination: Final Report* (n 2) 26 [1.6].

<sup>44</sup> Hendrikus Berkhof, *Christian Faith: An Introduction to the Study of the Faith*, tr Sierd Woudstra (William B Eerdmans Publishing, 1979) 179.

<sup>45</sup> Nicholas Wolterstorff, *Justice: Rights and Wrongs* (Princeton University Press, 2009) 352; Walter Brueggemann, *The Message of the Psalms: A Theological Commentary* (Augsburg Books, 1984) 27.

<sup>46</sup> Anton ten Klooster, 'Thomas Aquinas on the Beatitudes: Reading Matthew, Disputing Grace and Virtue, Preaching Happiness' (DPhil Thesis, Tillburg University, 2018) 21.

<sup>47</sup> Stephanie Kirchgaessner, 'Pope Francis Tells Gay Man: "God Made You Like This"', *The Guardian* (online, 20 May 2018) <<https://www.theguardian.com/world/2018/may/20/pope-juan-carlos-cruz>>; Peter Smith, 'Vice President JD Vance, a Catholic, Acknowledges the Pope's Criticism of US Immigration Crackdown' *Associated Press* (online, 1 March 2025) <<https://apnews.com/article/vice-president-jd-vance-pope-francis-immigration-4f05693320524f9976d3b9ebe31b3f97>>.

<sup>48</sup> The Holy See, 'Letter of the Holy Father Francis to the Bishops of the United States of America', *Vatican Archives* (Web Page, 10 February 2025) [3] <<https://www.vatican.va/content/francesco/en/letters/2025/documents/20250210-lettera-vescovi-usa.html>> ('Letter of Pope Francis').

<sup>49</sup> Pat Loria, 'Religious Information Poverty in Australian State Schools' (2006) 49(3) *Journal of Christian Education* 21, 21.

<sup>50</sup> Centre for Policy Development, *Uneven Playing Field: The State of Australia's Schools* (Final Report, June 2016) 9.

<sup>51</sup> Umaru Zubairu, 'The Impact of Attending Religious Schools on the Moral Competencies of Accounting Students' (2016) 10(4) *Journal of Education and Learning* 355, 364; Education Scotland, *Religious and Moral Education 3–18* (Final Report, February 2014) 6.

<sup>52</sup> Australian Catholic Bishops Association, Submission No 406 to Australian Law Reform Commission, *Inquiry into Religious Educational Institutions and Anti-Discrimination Laws* (3 March 2023) 6; *Religious Schools and Discrimination: Final Report* (n 2) 65 [3.14].

Pope Francis recently indicated that recognising the biblical right to dignity involves welcoming, protecting, promoting, and integrating society's fragile, unprotected, and vulnerable members, making it difficult to reconcile such detriments with Genesis 1:27.<sup>53</sup> As the inverse conclusion is necessary to submit that the *SDA* s 38 should remain unchanged, that outcome is not supported by Genesis 1:27.<sup>54</sup>

Some counterarguments suggest that discriminating is not contrary to Genesis 1:27, even if the provided interpretation is accepted, thereby justifying the amendment policy outcome.<sup>55</sup> These primarily revolve around balancing that verse with those that invalidate sexual minorities, gender diverse persons, and pregnancy without marriage, and the fear that removing the ability to discriminate would undermine religious teachings in such institutions.<sup>56</sup> Legitimacy is granted to such suggestions by the peculiarity of a conclusion that Genesis 1:27 supports the destruction or corruption of the teachings of Christianity and other religions.<sup>57</sup>

However, repealing the relevant section would likely not, and should not, if freedom of religion is to be maintained, alter the curriculum of religious schools.<sup>58</sup> It is also a practical reality that even if discriminating against staff and students is legal, most religious schools, particularly Christian ones considering Genesis 1:27, have not done so for several years, to little consequence.<sup>59</sup> The fundamental idea of Christianity that all are made in the image of God conclusively supports a repeal of the *SDA* s 38.

## B. UNCONDITIONAL COMPASSION

Another foundation of the Christian faith is that compassion is unconditional. The famous parable of the good Samaritan is often referenced to demonstrate this.<sup>60</sup> As described in Luke 10:25-37, Jesus utilises the parable to clarify the divine command that 'you shall love your neighbour as yourself'.<sup>61</sup> The story involves a man, commonly presumed Jewish, who is robbed and left for dead and is passed by two Jewish religious figures.<sup>62</sup> Eventually, a Samaritan, whose relationship with Jews was heavily strained, takes the man to an inn and pays for him to be cared for while he recovers.<sup>63</sup>

<sup>53</sup> 'Letter of Pope Francis' (n 48) [5].

<sup>54</sup> *Religious Schools and Discrimination: Final Report* (n 2) 164 [5.65].

<sup>55</sup> Australian Catholic Bishops Association (n 52) 2; Law Council of Australia, Submission No 428 to Australian Law Reform Commission, *Inquiry into Religious Educational Institutions and Anti-Discrimination Laws* (24 March 2023) 7 [6]; *Religious Schools and Discrimination: Final Report* (n 2) 161 [5.53].

<sup>56</sup> Australian Catholic Bishops Association (n 52) 2, 6; *Biblica* (n 37) Corinthians 6:18-20; *Biblica* (n 37) Deuteronomy 22:5; *Biblica* (n 37) Genesis 1:27; *Biblica* (n 37) Leviticus 18:2; *Biblica* (n 37) Revelation 14:4.

<sup>57</sup> Australian Catholic Bishops Association (n 52) 2; Deagon (n 23) 27; Letter of Pope Francis (n 48) [4].

<sup>58</sup> Australian Catholic Bishops Association (n 52) 2; *Australian Constitution* s 116; Deagon (n 23) 27; Law Council of Australia (n 55) 7 [6].

<sup>59</sup> Australian Catholic Bishops Association (n 52) 2, 6.

<sup>60</sup> Maurice Ryan, 'Revisiting the Parable of the Good Samaritan' (2021) 16(1) *Studies in Christian-Jewish Relations* 1, 14; Patrick M Clark, 'Reversing the Ethical Perspective: What the Allegorical Interpretation of the Good Samaritan Parable Can Still Teach Us' (2014) 71(3) *Theology Today* 300, 303.

<sup>61</sup> *Biblica* (n 37) Leviticus 19:18; *Biblica* (n 37) Luke 10:25-37.

<sup>62</sup> *Biblica* (n 37) Luke 10:30-2. See Jeannine K Brown and Kazuhiko Yamazaki-Ransom, 'The Parable of the Good Samaritan and the Narrative Portrayal of Samaritans in Luke-Acts' (2021) 15(2) *Journal of Theological Interpretation* 233, 234.

<sup>63</sup> *Biblica* (n 37) Luke 10:33-5; Christopher Naseri-Mutiti Naseri, 'Jews Have no Dealings with Samaritans: A Study of Relations Between Jews and Samaritans at the Time of Jesus Christ' (2014) 11(2) *LWATI: A Journal of Contemporary Research* 75, 75.

Jesus describes the Samaritan as the only neighbour to the man.<sup>64</sup> Many interpretations accordingly suggest that the neighbourly principle and general moral responsibility surpass prejudicial barriers and cultural conditions.<sup>65</sup> This meaning is supported by other verses, such as the golden rule to ‘in everything, do to others what you would have them do to you’.<sup>66</sup> The absence of any attached preconditions is particularly telling.<sup>67</sup> Some allegorical interpretations of the parable suggest that the injured man represents a sinner, the Samaritan represents Jesus, and the inn represents the Church. However, this analytical distinction yields the same message: moral responsibility is not altered by individual or social characteristics.<sup>68</sup>

This relatively consistent interpretation of the parable has led to its application in various contexts. Lord Atkin alluded to it rhetorically when establishing negligence.<sup>69</sup> Martin Luther King Jr referenced the tale to describe societal obligations for marginalised groups.<sup>70</sup> Several theologians argue that the Good Samaritan is a biblical authority for a mutual obligation of love between all, even and relevantly, non-believers.<sup>71</sup>

By analogy and considering that Jesus, referring to the Samaritan, called for us to ‘do likewise’, repealing the *SDA* s 38 aligns with the parable.<sup>72</sup> In Australia, all persons are required to participate in schooling until at least completing Year 10.<sup>73</sup> Therefore, offering an education is identifiable as aiding and extending compassion where needed, including to the current or prospective student who has been discriminated against.<sup>74</sup> The beneficiaries of such assistance arguably extend beyond the students, given the numerous familial and societal benefits a private education provides, which strengthens the argument.<sup>75</sup> A similar point, although less persuasive given that working in a school is optional, is available for employment matters related to current or prospective staff who may be victims of discrimination.<sup>76</sup> This is particularly true in light of the numerous unique benefits of working in a religious school, especially the superior compensation.<sup>77</sup>

<sup>64</sup> *Biblica* (n 37) Luke 10: 36–7.

<sup>65</sup> JIH McDonald, ‘The View from the Ditch – and Other Angles: Interpreting the Parable of the Good Samaritan’ (1996) 49(1) *Scottish Journal of Theology* 21, 36.

<sup>66</sup> *Biblica* (n 37) Matthew 7:12. See The Holy See, ‘Samaritanus Bonus: On the Care of Persons in the Critical and Terminal Phases of Life’, *Vatican Archives* (Web Page, 22 September 2020) <<https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2020/09/22/200922a.html#:~:text=The%20Good%20Samaritan%20who%20goes,and%20the%20wine%20of%20hope>>.

<sup>67</sup> Naseri (n 63) 76.

<sup>68</sup> Brown and Yamazaki-Ransom (n 62) 245; Naseri (n 63) 76.

<sup>69</sup> *Donoghue v Stevenson* [1932] AC 562, 580 (Lord Atkin).

<sup>70</sup> Douglas A Hicks and Mark R. Valeri, *Global Neighbours: Christian Faith and Moral Obligation in Today's Economy* (Eerdmans Publishing Company, 2008) 31.

<sup>71</sup> Calvin Jean, *Commentary on a Harmony of the Evangelists, Matthew, Mark, and Luke*, tr Reverend William Pringle (Calvin Translation Society, 1845–6) vol 3, 54; Francis Schaeffer, *The Mark of the Christian* (InterVarsity Press, 2006) 18.

<sup>72</sup> *Biblica* (n 37) Luke 10:37; *SDA* (n 1) s 38.

<sup>73</sup> Australian Curriculum, Assessment and Reporting Authority, *National Report on Schooling in Australia 2022* (Report, 26 June 2024) 14.

<sup>74</sup> *Religious Schools and Discrimination: Final Report* (n 2) 89 [4.17]; Naseri (n 63) 76.

<sup>75</sup> Mike Dockery, ‘Does Private Schooling Pay? Evidence and Equity Implications for Australia’, *National Centre for Student Equity in Higher Education* (Research Paper, April 2018) 9 <[https://www.ncsehe.edu.au/app/uploads/2018/04/Dockery\\_Does\\_Private\\_Schooling\\_Pay.pdf](https://www.ncsehe.edu.au/app/uploads/2018/04/Dockery_Does_Private_Schooling_Pay.pdf)>.

<sup>76</sup> *Religious Schools and Discrimination: Final Report* (n 2) 155 [5.27]; *SDA* (n 1) s 38.

<sup>77</sup> *Religious Schools and Discrimination: Final Report* (n 2) 230 [8.120].

Electing for the *SDA* s 38 to remain unchanged involves placing conditions based on individual traits and social considerations when exercising compassion.<sup>78</sup> Even the case for amendment, assuming an implementation to narrow the provision's application, would impose at least some restrictions related to personal traits.<sup>79</sup> Only a repeal, which extends compassion to sinners and non-believers without exception, implements the neighbourly principle as explained by the Samaritan.<sup>80</sup>

### C. CHRIST'S RADICALLY INCLUSIVE MINISTRY

On several occasions, Jesus extends love and compassion to sinners, including travelling through Samaria, touching and allowing himself to be touched by the morally and physically unclean, and eating with tax collectors and sinners.<sup>81</sup> The common and relevant perception is that Jesus offered forgiveness before requiring reformation in such instances.<sup>82</sup> This point and its relevance have attracted criticism, especially when applied as a precedent to include even sinners.<sup>83</sup> The distinction often raised is that while Jesus was radically inclusive, he also distinguished between tolerance and endorsement, so prior repentance was required.<sup>84</sup>

While tolerating persons may be perceived as distinct from endorsing behaviours, that is immaterial to inclusivity, considering Luke 7:47: 'I [Jesus] tell you, her [the sinful woman's] many sins have been forgiven — as her great love as shown. But whoever has been forgiven little loves little'.<sup>85</sup> Jesus thus elevates the sinful woman above the Pharisee Simon, his host and religious adherent, who declined to offer Jesus the same hospitality as the woman and judged her only 'a sinner'.<sup>86</sup> Accordingly, although humans cannot forgive sin as Christ and God can, forgiving the sins of others is necessary for their repentance to occur, so excluding the sinful denies that opportunity.<sup>87</sup>

Given that conclusion, Jesus' conduct towards sinners indicates that the *SDA* s 38 should be repealed.<sup>88</sup> To uphold the provision is to act as Simon did and impose personal self-righteousness to judge whether a sinner is worthy of forgiveness and, if not, deserves

<sup>78</sup> Australian Catholic Bishops Association (n 48) 2; Brown and Yamazaki-Ransom (n 62) 245; Naseri (n 63) 76; *SDA* (n 1) s 38; *Religious Schools and Discrimination: Final Report* (n 2) 164 [5.65].

<sup>79</sup> Australian Catholic Bishops Association (n 48) 2; Law Council of Australia (n 55) 7 [6]; Naseri (n 63) 76; *Religious Schools and Discrimination: Final Report* (n 2) 161 [5.53].

<sup>80</sup> *Biblica* (n 37) Luke 10:37; *SDA* (n 1) s 38; Schaeffer (n 71) 18.

<sup>81</sup> *Biblica* (n 37) Luke 5, 15:19; *Biblica* (n 37) Mark 2; *Biblica* (n 37) Matthew 9, 11.

<sup>82</sup> Parish Saunders (ed), 'Jesus and the Sinners' (1983) 6(19) *Journal for the Study of the New Testament* 5, 20; Mark Allen Powell, 'Jesus and the Pathetic Wicket: Re-visiting Sanders's View of Jesus' Friendship with Sinners' (2015) 13(2-3) *Journal for the Study of the Historical Jesus* 186, 188.

<sup>83</sup> Craig Blomberg, 'Jesus, Sinners and Table Fellowship' (2009) 19(1) *Bulletin for Biblical Research* 35, 36; Norman H Young, 'Jesus and the Sinners: Some Queries' (1985) 7(24) *Journal for the Study of the New Testament* 73, 74.

<sup>84</sup> Young (n 83) 74.

<sup>85</sup> *Biblica* (n 37) Luke 7:47.

<sup>86</sup> *Ibid* Luke 7:39. See Dorothea H Bertschmann, 'Hosting Jesus: Revisiting Luke's "Sinful Woman" (Luke 7:36-50) as a Tale of Two Hosts' (2017) 40(1) *Journal for the Study of the New Testament* 30, 46.

<sup>87</sup> Bertschmann (n 86) 46; Justyn Terry, 'The Forgiveness of Sins and the Work of Christ: A Case for Substitutionary Atonement' (2013) 95(1) *Anglican Theological Review* 9, 23.

<sup>88</sup> Queensland Human Rights Commission (n 5) 2 [3]; *Religious Schools and Discrimination: Submissions* (n 3) 3 [15].

exclusion.<sup>89</sup> An amendment may significantly avoid this.<sup>90</sup> However, short of a substantial change to the section's operation that effectively operates as a repeal, judging sinners is involved to some extent.<sup>91</sup> Even Simon let the sinful woman enter his home, while Jesus never discriminated against or declined to engage with a sinner.<sup>92</sup>

## V. CONCLUSION

Considering the application of classical natural law, it is submitted that the *SDA* s 38 should be repealed. Specifically, from the general precept to be sociable, a specific conclusion that religious schools cannot discriminate is achievable, so a law enabling that in any form is unjust. This is derivable because it aligns with the idea that everyone is made in the image of God, the concept of unconditional compassion, and the fact that Jesus did not discriminate against sinners. The analysis is constrained by relying heavily on subjective biblical interpretation, but it is still submitted that repealing the *SDA* s 38 is optimal considering the literature and all the circumstances.

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<sup>89</sup> Bertschmann (n 86) 37; *Biblica* (n 37) Luke 7:39; Terry (n 87) 23.

<sup>90</sup> Australian Catholic Bishops Association (n 48) 2; Law Council of Australia (n 55) 7 [6]; Naseri (n 63) 76; *Religious Schools and Discrimination: Final Report* (n 2) 161 [5.53].

<sup>91</sup> Bertschmann (n 86) 37; *Biblica* (n 37) Luke 7:47; Terry (n 87) 23.

<sup>92</sup> *Biblica* (n 37) Luke 7:37; Saunders (n 82) 20.